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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 774

HARRIS STRUCTURAL STEEL COMPANY, INC.,

Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL 3682, and UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, Harris Structural Steel Company, Inc., prays for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review an order of that court entered January 22, 1962. A certified copy of the record, printed below is filed herewith in accordance with Rule 31, par. 2 of the Rules of this Court.

Opinions Below.

The opinion of the United States District Court for the District of New Jersey (R. 67a-89a)[1] is unreported. The opinion of the United States Court of Appeals for the Third Circuit is not reported at this printing and is appended to this petition in the appendix at pp. 1a-5a.

[1] Record references herein are to the Appendix in the Court of Appeals below.

Jurisdiction to Review.

The date of the order of the United States Court of Appeals for the Third Circuit sought to be reviewed is January 22, 1962.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Questions Presented.

1. Is summary judgment possible where the court below (App. *infra*, pp. 1a-5a) concludes that the only evidence offered by both parties has been "contradicted" and "the case was not one which could be disposed of properly on motion for summary judgment . . ."; is this defect ever remedied and is rule 56 (c) of the Federal Rules of Civil Procedure and all case law interpretation thereof, thereby overridden by the Court's conclusion that despite a factual dispute, summary judgment may be affirmed because the "law in this case is so plain as to permit no alternative"?

2. Having directed the parties to proceed to arbitration, was it proper for the Court of Appeals to decide the very question that the Union will offer as the issue in that arbitration and thus involve itself in the merits of the grievance contrary to the principles enunciated in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960)?

Statutes and Contract Provisions Involved.

1. Section 301(a) of the Labor Management Relations Act (Act of June 23, 1947, 61 Stat. 156), 29 U. S. C. §185(a), provides in pertinent part:

"Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."[1]

2. N. J. S. 2A:46-53 (The Uniform Declaratory Judgment Law) (L. 1924, c 140) provides in pertinent part:

"A person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder."

3. Fed. Rules Civ. Proc. rule 56(c), 28 U. S. C. A. (Summary Judgment) provides in pertinent part:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

4. Relevant provisions of the collective bargaining agreement (R. 23a) are set forth at appropriate places in the body of this petition.

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[1] It has been assumed, without deciding, by both courts below and by both parties that an interpretation of such section includes jurisdiction in a suit for a declaratory judgment of a collective bargaining agreement—*cf. Radio Corporation of America* v. *Association of Professional Engineering Personnel et al.*, 291 F. 2d 105, 107 (3 Cir., 1961), certiorari denied, U. S. , 82 S. Ct. 174, 7 L. Ed. 2d 93, and cases cited therein.

Statement.

This case is not a re-hash of arbitrability. It began as a suit by an employer to determine whether a grievance was arbitrable under a collective bargaining agreement. It now presents a question of a serious deviation by the Court of Appeals in the use of summary judgment—whether a court can conclude, on the one hand, that the facts are contradictory, and, on the other hand, deny this petitioner a hearing by granting summary judgment, because of the court's interpretation of a substantive Federal policy in the field of labor law expressed by this Court. It is submitted that the court below disregarded established principles of summary judgment, the Federal Rules of Civil Procedure and case law in each of the Circuits. The petitioner contends that on the basis of the opinion of the court below, summary judgment is not possible in this case. Furthermore, the petitioner contends that the court below has erroneously involved itself in the merits of the grievance, contrary to the law of this Court.

Harris Structural Steel Company, Inc., herein called the "Company" and United Steelworkers of America, AFL-CIO, Local 3682, and United Steelworkers of America, AFL-CIO, herein called the "Union," are parties to a collective bargaining agreement entered into on March 14, 1960, which agreement was in effect during December, 1960, and January, 1961, the date of the subject grievance. It will not expire until July 31, 1962 (R. 23a-24a).

The Company has gratuitously for the past twelve years, at Christmas time, as a humanitarian gesture and in the spirit of the season, made Christmas gifts in varying amounts to every one of its employees, including all individuals not covered by the said collective bargaining

agreement, though under no obligation to do so. The gift was a payment of money in accordance with a formula, which, although it had been changed over the years, was computed in 1959 as set forth in the pleadings (R. 47a). There is no mention whatever of such gift in the collective bargaining agreement.

The question of payment of the Christmas gift was the subject of collective bargaining at the last two contract negotiations. During negotiations in August, 1959, the Union requested that the payment of this money be made a part of the collective bargaining agreement, but such request was flatly refused by the Company and the gift was excluded from the agreement (R. 18a, 19a, 25a, 30a, 31a, 39a, 41a-46a).[1]

In and during December, 1960, the Company again voluntarily made such gifts, though in a proportionately decreased amount, to every one of its employees. The amount paid was exactly one-half of the amount paid in 1959 as outlined in the formula heretofore referred to (R. 47a).

Thereafter, on or about January 3, 1961, the Union submitted a grievance to the Company as follows:

> "Since the Christmas gift has always been considered as part of our wage earnings, we, the officers of Local Union 3682, United Steelworkers of America, request that the company immediately give full payment of the Christmas Gift Plan that has been in effect for many years and allocated according to a

[1] The affidavits submitted by the Company stated: ". . . [the Christmas gift] is a voluntary act by the Company within the sole discretion of the principals of the Company" and ". . . this Christmas gift could not be made part of the labor agreement because there was no guarantee that it would be continued" and that it could not be promised because it was ". . . both speculative and undetermined until December in each year" (R. 40a). Thereafter ". . . the request was abandoned by the Union" (R. 40a).

stipulated formula to all of the employees of the Harris Structural Steel Company for the year 1960."

The Company denied the grievance and further refused to proceed to arbitration since issue of the payment of such gift had been disposed of at contract negotiations by not making it part of the contract.

The collective bargaining agreement provides for the adjustment of certain grievances, as follows:

ARTICLE VII

Adjustment of Grievances

"Section 1. Should differences arise beween the Company and the Union or between the Company and any of its employees as to the meaning and application of the provisions of this agreement or as to any question relating to the wages, hours of work and other conditions of employment of any employee there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle them promptly and in accordance with the provisions of this agreement and in the manner hereinafter set forth."

On or about January 19, 1961, the Union unilaterally requested arbitration of the grievance by the American Arbitration Association, 477 Madison Avenue, New York 22, New York. The Company in turn informed the American Arbitration Association and the Union by letter dated January 24, 1961, that the matter was not arbitrable (R. 7a). Notwithstanding all of this, the Union indicated that it would continue to seek arbitration.

1. The Complaint, the Granting of a Stay of Arbitration, Removal to the District Court, Answer and Counterclaim.

On February 16, 1961, the Company filed a complaint (R. 3a-13a) in the Superior Court of New Jersey, Law Division, requesting judgment in accordance with N. J. S. 2A:16-50 *et seq.* (The Uniform Declaratory Judgment Law), seeking a declaration of its rights under the collective bargaining agreement with the Union and specifically asking for a determination by that Court that the matter in controversy was one not within the scope of the collective bargaining agreement, and was, therefore not arbitrable. At the same time the Company sought and was granted ad interim relief in the nature of a temporary stay of arbitration, permitting the matter to be decided by the State Court.

On March 3, 1961, the Union filed a petition for removal of the action from the Superior Court of New Jersey, Law Division, to the United States District Court for the District of New Jersey, notifying the Company of its action (R. 14a). This was accomplished by the Union on the basis of Section 301(a) of the Labor Management Relations Act (Act of June 23, 1947, 61 Stat. 156) 29 U. S. C. §185(a), (set forth *infra* p. 2) without objection by the Company. The Union filed its answer and a counterclaim by which it sought an order compelling the Company to arbitrate the grievance (R. 14a-25a). The Company filed an answer to such counterclaim (R. 26a-28a). The stay of arbitration was continued by the consent of counsel for the parties.

2. The Motions for Summary Judgment.

At the oral argument on the Company's motion for a stay of arbitration on April 3, 1961, before the District Court Judge, The Honorable Arthur S. Lane, USDJ, it was concluded by the Court and the parties that summary judg-

ment would be an expeditious manner of disposing of the case and the Court granted leave to file briefs, affidavits, counteraffidavits and exhibits in support of the motions for summary judgment. The matter was further stayed by mutual agreement pending disposition of the motions.

The Union filed its motion demanding summary judgment in its favor upon the complaint and the counterclaim "based upon the pleadings, affidavits, etc. now on file and such other affidavits as may be hereafter filed" (R. 28a). Supplemental affidavits were submitted (R. 29a-31a). The Company filed its motion demanding summary judgment in its favor upon its complaint and for a dismissal of the Union's counterclaim "based upon the pleadings, affidavits, exhibits and addenda thereto now on file and such other affidavits as may be hereafter filed" (R. 34a). Supplemental affidavits were filed and, in the language of the Court of Appeals in its opinion (App., *infra*, p. 4a) "extensive documentary evidence" was submitted by the Company (R. 35a-66a). Yet no answering affidavits were filed by the Union. Presumably, no facts were in dispute.[1]

3. The Decision of the District Court.

Both motions for summary judgment were argued on May 1, 1961 (R. 67a-89a) and at the close of oral argument on the same date, the Court concluded "that the matter must go to arbitration" (R. 87a). It was not without reservation on the Court's part, however.[2]

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[1] At least this is what everyone thought. The District Court Judge so concluded at the hearing (R. 70a); the judgment of the Court so concluded (R. 90a). There were no protestations by counsel for the Union in any of its affidavits or at oral argument on the motion—none, until the Union's Answering Brief in the Court of Appeals when, for the first time, the Union refuted the factual posture of the case.

[2] "The Court: Gentlemen, I would be less than frank with you if I didn't say when I first looked at this file and when I first

On May 12, 1961, the District Court entered an order (R. 90a):

> ". . . concluding from the pleadings, affidavits and other papers on file that there is no genuine issue as to any material fact and that the plaintiff [Company] is not entitled to summary judgment in its favor on its complaint as a matter of law, and that the remaining defendants [Unions] are entitled to a summary judgment as a matter of law in their favor both on the complaint and on the counterclaim, . . ."

4. The Company's Appeal to the United States Court of Appeals for the Third Circuit.

The cause was appealed to the United States Court of Appeals for the Third Circuit on May 22, 1961 (R. 92a).

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looked at these cases (34) and first considered this matter, that I thought that the company would prevail in this court. However, I did have great difficulty in interpreting some of these decisions, and I have spent considerable time on it since my first endeavor. I am now satisfied that my first impression was an erroneous one under these decisions, and that under these three companion decisions, Warrior [*United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960)] and the two companions in 363 U. S. [*United Steelworkers* v. *American Manufacturing Company*, 363 U. S. 564 (1960); *United Steelworkers* v. *Enterprise Wheel and Car Corporation*, 363 U. S. 593 (1960)] and under *International Telephone & Telegraph Corporation* v. *Local 400* in 286 F. 2d at page 329 [3 Cir. 1960]. I am satisfied from these decisions that unless when you have, as we have here, a no strike, broad no strike, no lockout and arbitration, grievance and arbitration, that unless—and a clause such I have already read at page 17, which says, "Should any differences arise"—and so forth, as to any question relating to wages, hours of work, and so forth that when we have the situation, as we do here, and there is no specific exclusion of the topic for subject matter in the contract, then I must rule that the matter must go to arbitration.

Now, I do so as a matter of fact and a matter of law with the hope, and the thought, too, that you will unquestionably take this to the Court of Appeals. I think the law on this matter needs (35) further clarification and a decision or two at that level or higher up that is clear, and a good many of us when we face these issues will have less difficulty than we are now having with it." (R. 87a)

On the same day, the Company made a motion in the Court of Appeals for a stay of arbitration pending appeal.

On June 6, 1961, after reviewing the transcript below, the memoranda of both counsel and, after oral argument, the Court of Appeals granted the Company's motion for such a stay pending disposition of the appeal (R. 96a), which stay is still in effect.[1]

On appeal, the Company presented an argument which urged that the District Court had erred in its application of the law to the undisputed facts and the judgment should, therefore, be reversed. (App., *infra*, p. 4a). The Company argued that on the basis of *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 585 (1960), despite the absence of a specific exclusion, the Company had submitted adequate, uncontroverted "forceful evidence" of an intention to exclude the subject matter of the grievance from the collective bargaining agreement.

This "forceful evidence" was so detrimental to the Union's appeal that it denied the existence of it. For the first time, on appeal, in the Union's Answering Brief, the Union denied that the facts were not in dispute and, indeed, urged that the facts were in dispute. The Company, in its Reply Brief, urged the court below not to allow the Union to refute the factual situation, or allegations and conten-

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[1] This is of some significance, in view of the fact that Circuit Courts have almost uniformly denied such stays *c.f.*, *Drakes Bakeries Incorporated* v. *Local 50, American Bakery & Confectionery Workers International, AFL-CIO, et al*, 196 F. Supp. 148 (S. D. N. Y., 1960), *revs'd*, 287 F. 2d 155 (2 Cir. 1961), *previous op. withdrawn, aff'd*, 294 F. 2d 399, certiorari granted, U. S. , 82 S. Ct. 480 (January 22, 1962), and the United States Court of Appeals for the Third Circuit had denied similar applications for a stay of arbitration on previous occasions. The Court's action evidenced an awareness of the District Court's comments relative to the state of the law (R. 87a; quoted p. 9, *infra*) and a sincere effort to clarify this field of labor law.

tions with respect thereto, in the Court of Appeals to suit its convenience.

At the oral argument, counsel for the Company acknowledged that the Union had contended on appeal that the facts were in dispute. Counsel further urged the court below that if the court did find that the facts were in dispute, then the Union was not entitled to summary judgment on its counterclaim and, of course, the Company was not entitled to summary judgment on its complaint, either. Counsel urged that in such an instance, the matter could not properly be disposed of on motion for summary judgment and should be returned to the District Court for a hearing on the complaint for a declaratory judgment and for a hearing on the Union's counterclaim.[1]

The Company provided the court with an extensive analysis of the *Warrior* decision and pointed out that this Court had allowed for submission of "forceful evidence" of an intention to exclude a matter from arbitration. (363 U. S. at page 585). The Company presented such evidence, presumably uncontroverted. It further outlined the law applicable to summary judgment, in the event the Court should conclude, itself, that the facts were in dispute.

5. The Decision of the Court of Appeals for the Third Circuit.

In spite of such established principles, the Court of Appeals came to an anomalous conclusion. It stated, in part, that,

> "Allegations of the affidavits filed on behalf of the Company are contradicted by an affidavit filed

[1] This is not inconsistent. "The fact that both parties make motions for summary judgment, and each contends in support of his respective motion that no genuine issue of fact exists, does not require the Court to rule that no fact issue exists." *Begnaud* v. *White*, 170 F. 2d 323, 327, (6 Cir., 1948).

by a staff representative of the International. The extensive documentary evidence offered by the Company is not decisive". (App., *infra*, p. 4a)

It is submitted that this finding by the Court should have been determinitive of the appeal and good practice and all case law required that the matter be remanded to the District Court for a hearing, at this point.

Instead of this, however, the Court went further and stated:

> "Were it not for the state of the law we would say that the case was not one which could be disposed of properly on motion for summary judgment but we think that the law in this case is so plain as to permit no alternative". (App., *infra*, p. 4a)

This was overreaching and constitutes one of the errors which is the basis for this appeal. The application of any substantive law, overriding the principles of summary judgment, once the Court finds that there is a contradiction in the evidence, goes beyond existing law and is a formulation of new law. The Court recognized that *but for* its interpretation of the state of the substantive law, the case could not be disposed of on motion for summary judgment. Of what consequence, then, is any substantive law once a factual dispute exists. As will be pointed out, this is contrary to the law of this Court.

In concluding that the grievance for a bigger Christmas gift should be arbitrated without affording the Company the benefit of a hearing, the Court did not just conclude, "go to arbitration". It went much further and proceeded to equate "Christmas gift" with "wages" (an issue properly for an arbitrator) and stated (App., *infra*, p. 4a):

> "Five points are very clear: first, the Company recognizes the Union as the exclusive representative

> of the employees in the bargaining unit in respect to rates of pay and wages; . . . third, the grievance and arbitration article of the agreement expressly includes any question relating to wages, . . . fourth, the sums granted, whether given or paid, to the employees at or near the Christmas season, were estimated in terms of wages; . . .".

And further (App., *infra*, p. 5a)

> "Wages are specifically included in the arbitration article of the collective bargaining agreement; the additional money grants are calculated in terms of wages . . . ".

Such language constitutes the other error which is the basis for this appeal.

The Court thus decided the very question that the Union will offer as the issue at arbitration—whether the Christmas gift has become part of the wage structure. This was without qualification or independent judgment and was concluded, in the Court's own words, on the basis of "extensive documentary evidence" which "is not decisive" (App., *infra*, p. 4a) and on affidavits which are "contradicted" (App., *infra*, p. 4a).

Reasons for Granting the Writ.

1. The decision below should be reviewed because it erroneously affirmed an order of summary judgment after concluding independently that the affidavits and other evidence which the parties had submitted relating to the material issue of the case were contradictory.

An anlysis of all of the proof offered by both the Company and the Union in the pleadings, and by affidavits and

the addenda thereto on the motion for summary judgment reveals that there is no material issue of fact that is in dispute, excepting the intention to exclude the subject of a Christmas gift from the collective bargaining agreement. This was acknowledged by the court below (App., *infra*, p. 2a).

The intention of the parties with respect to the Christmas gift is surely "material". This Court has said, "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . .". *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 585 (1960). The granting of an order of summary judgment in the light of the existence of a dispute as to only facts in issue is clearly error.

Does it now become the law that if a court is convinced that a moving or defending party is right or wrong, it can so find, save the conclusion that its opinion is based on nothing more than the self serving declaration that the law is "plain" to the court? To what facts is the court applying its conclusion of law, if those facts are in dispute? What happens to the rights of the parties in the particular case? When does a party have the opportunity to show to a trial court the facts which the upper court says are contradicted and which constitute the gravamen of the complaint and counterclaim? Does substantive law, no matter how "plain," clear or even overwhelming it is to a particular court, override principles of summary judgment that a party has relied upon?

These are serious questions of far reaching and recurring significance not only to this petitioner but to any other litigant who relies on summary judgment as an expeditious method of applying existing law to established facts.

The law which is "plain" to the court below and which compelled it to disregard the established summary judgment procedure is contained in the three momentous decisions in the field of labor arbitration filed in June, 1960. *United Steelworkers of America* v. *American Manufacturing Company*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corporation*, 363 U. S. 593 (1960); and *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 363 U. S. 574 (1960). Since that time, both labor and management have had the positive benefit of what was said in those opinions.

Although the Supreme Court stated that a specific exclusion in a labor agreement would relieve a party of the obligation to arbitrate, it went further and said that a court would also consider "forceful evidence" of an intention to exclude, *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 585 (1960). This acknowledgment by the Court that something other than a specific, clear and unequivocal written exclusion would be considered, has produced much controversy and is, in fact, the subject of this very action.

It has gotten to the point where the District Court Judges have abandoned all synthesis in favor of a doctrine which may or may not exist. *Maryland Tel. Union* v. *Chesapeake & Potomac Tel. Co.*, 187 F. Supp. 101 (D. Md. 1960). Indeed, in the case at bar, the District Court Judge expressed a hope for a clarification (R. 87a), *infra*, p. 8.

In the meanwhile, Companies and Unions continue to be charged with negotiating and administering collective bargaining agreements. If the only way to exclude a matter from arbitration is by means of a specific written exclusion, then so be it. Up to this point this Court has not stated this to be the law. When a Court of Appeals such as the court

below provides an interpretation that modifies and even supplants the procedural rules for summary judgment, then in the interests of consistency and certainty and perhaps even toward the elimination of needless suits, this Court should so state such a change. With the presence of language in the existing opinions calculated to encourage the review of "forceful evidence" of an intention or purpose to exclude, all parties have relied on their right to show this intention. If this right is to be supplanted by an overriding public policy at least in the enforcement of labor agreements where the parties have voluntarily agreed to an arbitration procedure, then this Court would advance labor management relationships ten fold by saying so.

In a zeal to implement a policy that the Supreme Court has expressed in a field of substantive law, the lower court in this case has unfortunately cast doubt upon the function and utility of summary judgment.

Even with respect to the substantive law expressed by this Court in its opinion in the *Warrior* case, this Court did not say that arbitration is commanded in every instance that a grievance is filed. Nor has this Court, or any other court ever held that summary judgment will lie as a procedural device where there is a genuine issue as to a material fact. Surely, the *Warrior* case has not changed this. But the essence of the lower court opinion is that even where there is a factual dispute, this is of no consequence or significance because of the lower court's interpretation of this Court's language relative to arbitration in the *Warrior* case.

In every other case before this Court involving the arbitrability of a grievance under a collective bargaining agreement, including the *Warrior* case itself, there was either a hearing by the District Court or complete agreement on the facts. In this case, the petitioner has not had the benefit of either of them. It was surely never this Court's intention

to clothe the Federal Policy expressed in *Warrior* in favor of the enforcement of labor agreements, with a mantle which shrouds the Federal Rules of Civil Procedure. Nor could it ever have been the intention to apply this policy, no matter how "plain" or compelling to the detriment of fair play and the rights of the litigants, all in the interests of achieving a desired result—arbitration.

This is not just an appeal of a Company who originally sought a declaratory judgment seeking to determine whether the parties intended to exclude a particular subject from the collective bargaining agreement. It is an appeal where both parties relied on summary judgment because the facts were not in dispute. Every one of the facts each party offered related to the material issue of the suit, the whole reason for the controversy—the "forceful evidence" of the intention to exclude. If the lower court had felt that the undisputed facts relating to the contractual language and the history of the parties relationship were enough for an unequivocal summary judgment, it would have so stated. Instead, it found that the affidavits containing all the facts, affidavits of the Union incorporating its answer and counterclaim by reference (R. 25a, 30a, 31a) were contradicted. The lower court would not have allowed summary judgment, had it not been moved by the language in *Warrior* (App. *infra*, p. 4a).

If, as the Court of Appeals has found, the facts are in dispute, then the Company is entitled to a hearing on those facts, at the very least.

It is a well settled rule that cross-motions for summary judgment do not warrant the court in granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed. There are similar statements throughout the case law that summary judgment cannot be granted

where the slightest doubt remains. Such questions rarely reach this Court because of the clarity of the decisions in the Circuits. "On motion for summary judgment, where the facts are in dispute, a judgment can properly be entered against the plaintiff only if, on the undisputed facts, he has no valid claim; if, then, any fact asserted by the plaintiff is contradicted by the defendant, the facts as stated by the plaintiff must, on such motion, be taken as true." *Zell* v. *American Seating Co*, 138 F. 2d 641 (2 Cir. 1943), *revsd*, 322 U. S. 709 (1944).

The issue is not circumvented by a conclusion that the law is "plain" for, "a surmise, no matter how reasonable, that a party is unlikely to prevail upon a trial, is not a sufficient basis for refusing him his day in court wth respect to issues which are not shown to be sham, frivolous, or so unsubstantial that it would be futile to try them' [citations omitted]". *Kennedy* v. *Bennett*, 261 F. 2d 20, 23 (8 Cir. 1958).

Counsel, in keeping with previous expresstons by this Court, views this petition for a writ of certiorari not as a means of telling this Court what the law is or how many hundred cases exist, but as a means of pointing out that there has been a deviation and it is of such importance and significance to warrant review by this Court.

Apart from formulating a new concept of summary judgment, the opinion of the court below in the case at bar will unquestionably create additional problems in a field of law where labor, management, arbitrators, writers, and lower court judges are looking to this Court for guidance. The opinion of the court below means that every time a court thinks the law is "plain" enough, the desired judicial result can be achieved, summary judgment and all other certainty, notwithstanding. This creates a new theory of

law never expressed by this Court, never enacted into the Federal Rules of Civil Procedure and is in conflict with each and every Circuit in the judicial system. The decision of the court below is in conflict with these decisions.

This is not right. For this reason alone, this Court should reverse the decision of the court below and remand to the District Court for a trial of the issues.

2. The decision of the court below should be reviewed because it erroneously has decided the very question that the Union will offer as the issue at arbitration, and, in equating "Christmas gift" to "wages", it has decided the issue on the merits and prejudged the arbitration, contrary to the law of this Court and to the detriment and prejudice of the petitioner.

The Company did not ask the court below for a determination that the Christmas gift was *not* a part of wages, for to do so would be to request a determination of the very issue sought to be decided by the arbitrator. Instead, the Company asked the Court to view the evidence and conclude that there was forceful evidence of an intention or purpose to exclude the subject matter of the grievance from the collective bargaining agreement.

Counsel for the Company pointed out at oral argument in the District Court below that even an attempt to jam "bonus" or "Christmas gift" into "wages" would be to decide the issue (R. 70a).

Yet the Court of Appeals not only did so and decided the issue which would ultimately be decided by the arbitrator but went even further than either party had ever suggested, basing its decision on five points, three of which equated the Christmas gift to "wages" to justify arbitration (*supra*, p. 12).

The court made no qualification, nor was there any indication that this was its own independent expression directing arbitration, such as it has on prior occasions.[1] The extent to which it became involved in the issue belies such an approach.

It should be considered that all of these conclusions flowed from facts which were "contradicted", and, in so concluding, the Court has literally concluded the issue for the petitioner. Parenthetically, one of the defenses at the arbitration would have been that the payment of a gift was not related to or equated with wages.

One of the salient points of the *Warrior* decision was that it is not the function of the court to concern itself with the merits of a grievance. Yet this is just what the court below did and the Union will unquestionably rely upon its interpretation. To have the issue prejudged without the benefit of a hearing, a brief, or oral argument, (for these points were not urged on appeal) has so prejudiced the petitioner and has so vitiated the letter and spirit of this Court's opinions in the *Warrior* case as to warrant reversal for a hearing in the District Court. If the opinion of the court below is allowed to stand, a fair and impartial arbitration has been foreclosed.

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[1] "We conclude, therefore, that the present grievance is a dispute concerning the interpretation of a labor contract and is covered by the contractual undertaking of the parties to arbitrate such disputes. We repeat that neither this holding nor anything said in this opinion is intended to prejudge in any way the merits of the dispute which the arbitrator will be asked to decide", per Circuit Judge Hastie, *Radio Corporation of America* v. *Association of Professional Engineering Personnel, et al.*, 291 F. 2d 105, 110 (3 Cir., 1961), certiorari denied, U. S. , 82 S. Ct. 174, 7 L. Ed. 2d 93 (November 6, 1961).

Conclusion.

Without attempting to be philosophical about it, it is well understood and a matter of record that a writ of certiorari is seldom granted. The sheer volume of cases precludes any other approach. But what is the remedy of a petitioner when a Court of Appeals allows its consideration of an area of substantive labor law to supplant the Rules on summary judgment and involves itself in the merits of a grievance to the extent that it decides the issue that the Union will offer at arbitration? It is respectfully submitted that this Court should consider the correction of those errors and, for the reasons set forth herein, grant this petition for a writ of certiorari.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

No. 13,626.

HARRIS STRUCTURAL STEEL COMPANY, INC., a Corporation of the State of New York Authorized to Do Business in the State of New Jersey,

Appellant,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL 3682, and UNITED STEELWORKERS OF AMERICA, AFL-CIO, an Unincorporated Association.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued November 3, 1961

Before BIGGS, Chief Judge, and MCLAUGHLIN and FORMAN, Circuit Judges.

OPINION OF THE COURT

(Filed January 22, 1962)

By BIGGS, Chief Judge.

Invoking the aid of the New Jersey Uniform Declaratory Judgments Act, 2A N. J. S. A. 16-50 *et seq.*, the plaintiff appellant, Harris Structural Steel Company, Inc., sued the defendant-appellee, United Steelworkers of America, AFL-

CIO, Local 3682, and certain union officers in the Superior Court of Middlesex County, New Jersey, seeking to have a grievance resulting from the demand of members of the Local for "Christmas gifts", in an amount and of a nature explained hereinafter, declared to be outside the scope of a collective bargaining agreement entered into by the Harris Company and the United Steelworkers of America, AFL-CIO, the International Union, and therefore outside the arbitration provisions of the agreement.

The defendants petitioned the court below to remove the case basing federal jurisdiction on Section 301 of the Labor Management Relations Act of 1947, 29 U. S. C. A. §185, and removal was effected.[1] The case was decided on a motion for summary judgment made by the defendants. The court delivered an oral opinion, and judgment was entered dismissing the complaint on the merits and in favor of the defendants on their counterclaim. Arbitration of the grievance was ordered. The following operative facts, we believe, cannot be disputed.

Since 1946 the International Union has been and still is the certified collective bargaining agent of the production and maintenance employees of the Harris Company. Since 1946 the International has negotiated collective bargaining agreements with that Company. On March 14, 1960, the Company entered into a new collective bargaining agreement with the International. This agreement was in effect during December 1960 and January 1961 and will not expire until July 31, 1962.

Article I, Section 1 of the 1960 collective bargaining agreement between the Company and United Steelworkers of America, AFL-CIO, provides: "The Company recognizes the Union as the exclusive representative of all the Employees for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment."

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[1] An answer and a counterclaim and affidavits were filed. The court below struck certain individual defendants, officers of the Local, from the record and ordered the International Union, United Steelworkers of America, AFL-CIO, added to the record as a party defendant.

Article VII of the agreement states: "Adjustment of Grievances. Section 1. Should differences arise between the Company and the Union or between the Company and any of its employees as to the meaning and application of the provisions of this agreement or as to any question relating to the wages, hours of work and other conditions of employment of any employee there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle them promptly and in accordance with the provisions of this agreement and in the manner hereinafter set forth." Step 5 of Article VII provides: "In the event the dispute shall not have been satisfactorily settled, the matter shall be appealed to the American Arbitration Association. The final decision of the Arbitrator designated by the said Association and accepted by the Company and the Union shall be binding."

Section 3 of Article VII states: "During the term of this agreement neither the Union nor any employee shall (a) engage in or in any way encourage or sanction any strike or other action which shall interrupt or interfere with work or production at any of the shops or (b) prevent or attempt to prevent the access of Employees to any of the shops. During the term of this agreement the Company shall not engage in any lockout of employees at any of the shops. The Company may suspend and later discharge any Employees who shall violate any provision of this Section."

In every year since 1946, in the period just before Christmas, the Company has granted to each employee in the bargaining unit an amount of money computed on the basis of days or hours of pay, at the employee's rate of pay, for each month or year of his service. The record is not too clear as to the precise rate at which this amount of money was calculated but there is no room for doubt that whatever the formula, the amounts were calculated in terms of wages. In December 1960, however, the Company made a grant of money in a substantially reduced amount, approximately 50% of that made in December 1959, to each employee in the bargaining unit.

The present dispute between the Harris Company, the Local and the International is narrow in scope. The Company maintains vigorously that the sums granted these employees were given as Christmas gifts and were not wages to which they were entitled. The Unions and the employees through the Unions, claim to the contrary. The Unions insist that this grievance of the employees is subject to arbitration under the collective bargaining agreement and in particular under the provisions of Article VII set out above. The Company asserts that uncontroverted evidence demonstrates that the parties to the collective bargaining agreement did not intend to include the subject matter of a grievance such as this within the agreement and hence within the provision for arbitration. We have examined the record carefully. Allegations of the affidavits filed on behalf of the Company are contradicted by an affidavit filed by a staff representative of the International. The extensive documentary evidence offered by the Company is not decisive. Were it not for the state of the law we would say that the case was not one which could be disposed of properly on motion for summary judgment but we think that the law in this case is so plain as to permit no alternative.

Five points are very clear: first, the Company recognizes the Union as the exclusive representative of the employees in the bargaining unit in respect to rates of pay and wages; second, the issue of bonus payments is not specifically excluded from the grievance provisions of the collective bargaining agreement; third, the grievance and arbitration article of the agreement expressly includes any question relating to wages, in addition to "differences . . . as to the meaning and application of the provisions of this agreement"; fourth, the sums granted, whether given or paid, to the employees at or near the Christmas season, were estimated in terms of wages; and, fifth, the agreement contains a no-strike provision.

It follows that this case is ruled, as the court below correctly indicated, by Textile Workers v. Lincoln Mills,

353 U.S. 448 (1957) and by United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). In Lincoln Mills, 455, the Supreme Court made it clear that an "agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." Mr. Justice Douglas stated: "Viewed in this light, the legislation [Section 301 of the Labor Management Relations Act] does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." See also United Steel Workers of America v. American Mfg. Co., 363 U.S. 564, 567 (1960).

Wages are specifically included in the arbitration article of the collective bargaining agreement; the additional money grants are calculated in terms of wages and are not specifically excluded from the article. Mr. Justice Douglas stated in the Warrior opinion, 581: "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement." The conclusion is irresistible that the grievance is arbitrable and that the court below was correct in so holding. The judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment.

UNITED STATES COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

No. 13,626.

HARRIS STRUCTURAL STEEL COMPANY, INC., a Corporation of the State of New York authorized to do business in the State of New Jersey,

Appellant,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL 3682, and UNITED STEELWORKERS OF AMERICA, AFL-CIO, an Unincorporated Association.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

PRESENT:

BIGGS, Chief Judge, and MCLAUGHLIN and FORMAN, Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

January 22, 1962.